

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES SECURITIES EXCHANGE
COMMISSION

:

: ORDER

Plaintiff,

: 19 Civ. 4355 (VM) (GWG)

-v.-

:

COLLECTOR'S COFFEE INC., et al

:

:

Defendants.

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GABRIEL W. GORENSTEIN, United States Magistrate Judge

It appears from the briefing on the SEC's motion for a subpoena (Docket # 1050) that (1) Mykalai Kontilai intends to invoke his Fifth Amendment privilege with regard to any topic areas that the SEC would seek to question him on at the preliminary injunction hearing; and (2) the SEC does not contest his right to do so. As is true for any invocation of Fifth Amendment privilege, the parties are free to argue whether an adverse inference should be drawn from such invocation. Whether or not the witness is physically present in court, however, should not have any bearing on the availability of an adverse inference.

In light of these facts, the parties are directed to consult with each other to determine whether they would agree to a stipulation on this topic. Some possible language appears in the margin.¹ The parties are of course free to alter the language to the extent they wish. By August

¹ Possible Language: "If present in Court for the hearing on the SEC's motion for a preliminary injunction, Mykalai Kontilai would assert his Fifth Amendment Privilege against self-incrimination with respect to any question concerning (a) each of the topics listed in the SEC's Proposed Findings of Fact (paragraphs 1-135 of Docket # 1052); (b) each of the "subjects of testimony" listed under "SEC Witnesses" in Docket # 1057; (c) each of the exhibits listed in the "SEC Initial Exhibit List 7/29/22" attached to Docket # 1057; and (d) each of the topics listed on page 11 of the brief appearing as Docket # 1051 (ECF page *15). The SEC does not contest Kontilai's right to assert the privilege. The parties will be free to argue the applicability or not of any adverse inference from the assertion of the Fifth Amendment privilege reflected in this stipulation on the same basis as if Mykalai Kontilai had appeared in Court and had invoked the Fifth Amendment privilege in response to specific questions on any of these topics, subjects of testimony, or exhibits."

31, 2022, the parties shall either file a stipulation resolving the motion or file a letter stating that no agreement can be reached and the Court should therefore rule on the motion for issuance of the subpoena.

SO ORDERED.

Dated: August 18, 2022
New York, New York



GABRIEL W. CORENSTEIN
United States Magistrate Judge